IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1007

H. EARL FULLILOVE, FRED MUNDER, JEREMIAH BURNS, JOSEPH CLARKE, GERARD A. NEUMAN, WILLIAM C. FINNERAN, JR., PETER J. BRENNAN, THOMAS CLARKSON, CONRAD OLSEN, JOSEPH DeVITTA, as Trustees of THE NEW YORK BUILDING AND CONSTRUCTION INDUSTRY BOARD OF URBAN AFFAIRS FUND; ARTHUR GAFFNEY as President of the BUILDING TRADES EMPLOYERS ASSOCIATION, GENERAL CONTRACTORS ASSOCIATION OF NEW YORK, INC., GENERAL BUILDING CONTRACTORS OF NEW YORK STATE, INC., and SHORE AIRCONDITIONING CO., INC.,

Petitioners,

v.

JUANITA KREPS, SECRETARY OF COMMERCE OF THE UNITED STATES OF AMERICA, THE STATE OF NEW YORK and THE CITY OF NEW YORK, THE BOARD OF HIGHER EDUCATION and THE HEALTH & HOSPITAL CORPORATION,

Respondents.

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The Equal Employment Advisory Council ("EEAC") respectfully submits this brief *amicus curiae* in support of the petition for a writ of certiorari in this case filed by H. Earl Fullilove, *et al.* It is submitted pursuant to the written consent of the parties.

INTEREST OF THE *AMICUS CURIAE*

EEAC is a voluntary, non-profit association, organized as a corporation under the laws of the District of Columbia. Its membership includes a broad spectrum of employers from throughout the United States, including both individual employers and trade associations. The principal goal of EEAC is to promote the common interest of employers and the general public in the development and implementation of sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices.

Substantially all of EEAC's members, or their constituents, are subject to the provisions of Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. §§ 2000e *et seq.*). In addition, those EEAC members, or their constituents, who are federal contractors are required to comply with Presidential Executive Order Number 11246 (30 Fed. Reg. 12319 (1965), as amended by 32 Fed. Reg. 14302 (1967), and 43 Fed. Reg. 46501 (1978)) ("E. O. 11246") and supporting regulations, which, in part, contain extensive affirmative action requirements. Many of these same members, as federal contractors, also are required to comply with federal minority business subcontracting programs and their affirmative action

and minority subcontracting requirements. Consequently, the members of EEAC have a direct interest in the issues presented for the Court's consideration in this case, which involve the legality of the minority business set-aside provision in the Public Works Employment Act of 1977 requiring that at least ten percent of all federal funds appropriated for specified public works projects be expended on bids tendered by minority business enterprises.

Because of its interest in issues pertaining to equal employment, EEAC has filed briefs as *Amicus Curiae* in a number of other recent cases raising important equal employment remedial issues. See, *e.g.*, *The Regents of the University of California* v. *Allan Bakke*, 98 Sup. Ct. 2733 (1978); *County of Los Angeles* v. *Davis* (No. 77-1553), *petition for cert. granted; Furnco Construction Corporation* v. *Waters*, 46 U.S.L.W. 4966 (1978); *Int'l Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977); *East Texas Motor Freight Systems, Inc.* v. *Rodriguez*, 431 U.S. 395 (1977); and *Kaiser Aluminum & Chemical Corporation* v. *Weber* (No. 78-435), *petition for cert. granted.*

STATEMENT OF THE CASE

Petitioners are several associations of contractors and subcontractors and a firm engaged in heating, ventilation and air conditioning work. They sought declaratory and injunctive relief to prevent the Secretary of Commerce as program administrator from enforcing the minority business set-aside provision of the Public Works Employment Act of 1977, 42 U.S.C. § 6705(f)(2). That section mandates that "no grant

shall be made under this chapter for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises." A minority business enterprise is defined as "a business at least 50 per centum of which is owned by minority group members. . . ." Minority group members are defined as "citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts."

The district court denied their petition and dismissed the complaint, holding that the provision was a constitutionally valid exercise of congressional power to remedy the effects of past discrimination in the construction industry.

The Court of Appeals for the Second Circuit affirmed the judgment of the district court, finding that "even under the most exacting standard of review the [minority business set-aside] provision passes constitutional muster."

REASONS FOR GRANTING A WRIT

I. THE SECOND CIRCUIT'S HOLDING THAT THE MINIMUM TEN PERCENT MINORITY BUSINESS SET-ASIDE AMENDMENT TO THE PUBLIC WORKS EMPLOYMENT ACT IS NOT UNCONSTITUTIONAL IS CONTRARY TO THE DECISIONS OF SEVERAL OTHER COURTS, AND HAS CONTRIBUTED TO UNCERTAINTY AND CONFUSION IN THE ACT'S IMPLEMENTATION NATIONWIDE.

A. The Split in Judicial Opinion

As the Second Circuit acknowledged, the constitutionality of the minimum 10 percent minority business set-aside amendment has been challenged in federal district courts nationwide. (Slip op. at 16-17 and cases cited therein). In several of those cases, preliminary injunctions against its enforcement were denied,[1] and in others the amendment was upheld.[2] In still other cases, however, the amendment has been

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[1] *See, e.g., Virginia Chapter, Associated General Contractors of America, Inc.* v. *Kreps*, 444 F. Supp. 1167 (W.D. Va. 1978); *Michigan Chapter, Associated General Contractors of America, Inc.* v. *Kreps*, —— F. Supp. ——, No. C.A. M-77-165 (W.D. Mich., Jan. 4, 1978); *Carolinas Branch, Associated General Contractors, Inc.* v. *Kreps*, 442 F. Supp. 392 (D. S.C. 1977); *Florida East Coast Chapter of the Associated General Contractors of America, Inc.* v. *Secretary of Commerce*, —— F. Supp. ——, No. C.A. 77-8351 (S.D. Fla., Nov. 3, 1977).

[2] See *Rhode Island Chapter, Associated General Contractors of America* v. *Kreps*, 446 F. Supp. 553 (D. R.I. 1978); *Associated General Contractors of Kansas* v. *Secretary of Commerce*, —— F. Supp. ——, No. C.A. 77-4218 (D. Kan., Feb. 10, 1978); *Fullilove* v. *Kreps*, 443 F. Supp. 253 (S.D.N.Y. 1977) (the district court decision below).

declared unconstitutional, and public officials have been enjoined from requiring compliance with its provisions.[3]

The decision of the Second Circuit represents the first appellate decision explicity upholding the program's constitutionality.[4] The decision, which is contrary to a previous district court decision in its own circuit,[5] has not discouraged district courts located in other circuits from disagreeing with the holding of the Second Circuit. Indeed, district courts in both California and Montana struck down the subject amendment as unconstitutional *after* the Second Circuit's decision upholding its constitutionality.[6]

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[3] *Associated General Contractors of Calif., et al.* v. *Secretary of Commerce*, 441 F. Supp. 955 (C.D. Cal. 1977), judgment vacated and remanded, 46 U.S.L.W. 3892 (U.S. July 3, 1978); original judgment reinstated in full (C.D. Cal., Oct. 20, 1978); *Montana Contractors Association* v. *Kreps*, —— F. Supp. ——, No. CV 77-62-M (D. Mont., 1978). *See also Wright Farms Construction, Inc.* v. *Kreps*, 444 F. Supp. 1023 (D. Vt. 1977) (amendment unconstitutional as applied).

[4] In its opinion, the Second Circuit declared its agreement with Third and Sixth Circuit decisions that "have upheld the constitutionality of the MBE amendment." (Slip op. at 17). See *Ohio Contractors Association* v. *Economic Development Administration*, 580 F.2d 213 (6th Cir. 1978); *Construction Association of Western Pennsylvania* v. *Kreps*, 573 F.2d 811 (3d Cir. 1978). In both of those cases, however, the circuit courts held only that the district courts had not abused their discretion in declining to issue a preliminary injunction.

[5] *Wright Farm Construction* v. *Kreps, supra* note 3.

[6] *Associated General Contractors of Calif., et al.* v. *Secretary of Commerce, supra*, note 3; *Montana Contractors Association* v. *Kreps, supra* note 3.

The impact of this split among the lower courts has caused great difficulty for private government contractors in attempting to conform to the requirements of the minority business amendment. Also, government officials have defended the amendment inconsistently. This perhaps is best illustrated by the fact that in some cases, such as *Associated General Contractors of Calif., et al.* v. *Secretary of Commerce*, 441 F. Supp. 955 (C.D. Cal. 1977), *judgment vacated and remanded*, 46 U.S.L.W. 3892 (U.S. July 3, 1978); *original judgment reinstated in full* (C.D. Cal., Oct. 20, 1978), the defendant officials argued that the case was moot because the appropriation already had been expended, while in other cases, such as the one here, the defendant officials did not contest the case on the grounds of mootness, and the issue was not discussed by the court.[7]

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[7] Judge Hauk noted in his decision after remand in *AGC of California, supra*, that three courts of appeals, including the Second Circuit in this case, determined the constitutionality of the minority business participation provision without any suggestion that the issue was moot. (Slip op. at 26). Judge Hauk also pointed out that in none of these cases did any of the defendants, including the federal defendant in the California case, make any argument that the cases were moot. (*Id.*, at 27). Indeed, he pointed to a statement by a Justice Department official that the Department's strategy in defending the various actions brought under the Act in question was simply "to stall litigation for as long as possible in order to keep the funds flowing." (*Id.*, at n.19).

It should be noted that the minimum 10 percent minority business participation provision was part of a set of amendments (popularly refered to as "Round II") to the Local Public Works Capital Development and Investment Act of

In any event, because the validity of the amendment, and of the program it incorporates, will remain open to frequent and recurring question, the clarification and administration of what Congress deemed an important national program is hampered. What clearly was meant to be a part of a national effort to boost employment levels in the construction industry [8] now is subject to selective implementation, depending upon the district in which a particular project is located.

Moreover, unless they are resolved, the problems created by the selective enforcement of the minority business participation amendment promise to grow more troublesome under other, more extensive, federal contracting programs that incorporate ethnic and racially related eligibility criteria. The issue of whether such programs are constitutional is clearly presented in the instant case. The decision below presents this Court with an opportunity to establish controlling principles in this area. Unless the issues are resolved at this time, it is likely that confusion and uncertainty will result from constant lower court litigation.

1976, Pub. L. No. 94-369, 90 Stat. 999-1012, codified at 42 U.S.C. § 6701 *et seq.*, amended by Pub. L. No. 95-28, 91 Stat. 116-121. When a "Round III" was proposed in 1978, the Carter Administration argued against it, apparently on the basis that the moneys appropriated under Round II still were being spent, and that its impact upon the nation's economy would continue through 1980. See Daily Labor Rep. No. 204, at A-3 (Oct. 20, 1978).

[8] S. Rep. No. 38, 95th Cong., 1st Sess. 1-2 (1977), *reprinted in* [1977] U.S. Code Cong. & Ad. News 150.

As we previously have indicated to the Court, confusion among court decisions and agency policies regarding the permissible legal limits of employment affirmative action has greatly hampered the effective administration of the employment related civil rights acts. Of particular concern is the negative impact this confusion has had upon voluntary compliance with those laws. See EEAC's brief supporting the petitions for certiorari in *Kaiser Aluminum & Chemical Corporation* v. *Brian F. Weber* and related cases (Nos. 78-432, 78-435, and 78-436). Unless issues such as those raised in the instant case are resolved by the Court, similar problems undoubtedly also will jeopardize the minority business programs.

B. The numerous judicial challenges to the minority business set-aside provision mirror similar constitutional issues concerning the legality of a wide array of other current minority business set-aside programs, many of which also could be subject to extensive and prolonged litigation.

The minority business set-aside amendment to the Public Works Employment Act is only one among many federal minority business assistant programs, some of which impact upon the entire range of federal government contracting. Whether promulgated by executive order and regulations, or enacted by statute, these programs utilize predominantly racially-based criteria in the awarding of a certain percentage of government contracts, and thus raise important constitutional questions similar to those raised here.[9]

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[9] For a brief summary of significant federal minority business assistance and subcontracting programs, see Appendix, *infra*.

Under Executive Order 11625, 36 Fed. Reg. 19967 (1969), for example, government agencies have promulgated a variety of regulations to promote minority business contracting opportunities. Although the Executive Order does not authorize set-asides, a temporary rule has been promulgated by one agency requiring federal contractors to establish percentage goals for minority business participation, with an initial percentage goal of 20% to be set in most cases. See Temporary Rule of the Department of the Interior, 43 Fed. Reg. 41207 (Sept. 15, 1978). The setting of percentage goals is justified by the Interior Department on the ground that minority businesses have been underrepresented historically in Interior procurement. No findings of past discrimination are set forth.

The uncertainty that exists as to the authority of executive departments to require such percentage goals also is present in the several Congressional enactments that authorize set-asides similar to the one presented here. For example, in accordance with directives under Section 905 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210 (90 Stat. 31), the Federal Railroad Administration requires recipients of federal monies under the Act to establish goals and timetables for minority business utilization. 49 C.F.R. § 265.5(j) (1977).

The most comprehensive legislation providing for minority business contracting set-asides is found in recent legislation amending the Small Business Act. Under this legislation (Pub. L. No. 95-507, 92 Stat. 1757, 15 U.S.C. §§ 683 *et seq.* (1978)), companies

receiving federal contracts exceeding one million dollars for construction and $500,000 for other purposes are required to develop and have approved a minority business subcontracting plan. The subcontracting plan must include, among other things, percentage goals for the utilization by contractors of small businesses generally and those owned and controlled by "socially and economically disadvantaged individuals." In the latter case, the contractor is to presume that Black, Hispanic and Native Americans, "other minorities," or individuals found to be disadvantaged under Section 8(a) of the Small Business Act are socially and economically disadvantaged. The legislation further provides that each procuring agency establish an Office of Small and Disadvantaged Business Utilization to consult with the Small Business Administration in developing "realistic goals" for small and disadvantaged business participation in federal contracts.

This legislation thus introduces into major contracts under the procurement system a minority business set-aside strikingly similar to the one at issue here, and insures a continuing need to clarify the extent to which the government may distribute a portion of federal contract monies to companies on the basis of the racial and ethnic profiles of its owners and operators. Additionally, as noted below, this legislative scheme is accompanied by a legislative history which, like the Public Works Employment Act, raises serious questions about the necessity for legislative findings of discrimination as a *sine qua non* for government sanctioned racial preferences.

C. The split among courts over the constitutionality of the minority business set-aside amendment raises critical questions, unresolved in *Bakke*, about the degree to which a governmental body must articulate findings of discrimination in order to establish lawfully racial and ethnic set-asides.

In its analysis of this Court's opinions in *Regents of the University of California* v. *Bakke*, 98 S. Ct. 2733 (1978), the Second Circuit identified two "analytically distinct" questions, both of which would have to be answered affirmatively in order to determine that the set-aside amendment was constitutional: (1) Was it the purpose of Congress to enact a remedy for past discrimination? and (2) Has discrimination in the past occurred? (Slip Op. at 7-8). The Second Circuit recognized that its conclusion that the set-aside was intended to remedy past discrimination was not based on statements made to that effect during legislative consideration of the amendment. Rather, the court "perceived", primarily from the statutory language itself, that any other purpose for the amendment would be "difficult to imagine." (*Id.*, at 10-11).

Other courts have disagreed with the Second Circuit's analysis, not because other purposes for the enacted amendment *may have existed*, but on the grounds that the reasons articulated by Congress for the amendment could not withstand the strict judicial scrutiny such racial classifications require. For example, the court in *AGC of California* v. *Secretary of Commerce*, *supra*, found that means of promoting employment of minority group contractors existed that were less intrusive than the "10% racial quota" and thus, as in *Bakke*, the amendment was not a

"necessary" means to promote a legitimate, substantial interest. (Slip Op. at 28).

The district court in *Montana Contractors' Association* v. *Secretary of Commerce*, *supra*, evaluated the amendment in terms of the legislative, administrative or judicial findings which this Court in *Bakke* declared were necessary to justify government sanctioned racial and ethnic distinctions. The court held that any Congressional findings made were, at best, inadequate because of a failure to identify the victims of past discrimination in the letting of government contracts. Unpersuaded that legislative findings as to unequal participation among nonminority and minority contractors are legally sufficient, the district court opined that *Bakke* "forbids the use of a [sic] general societal discrimination to justify a scheme which seeks to insure that in any given facet of public life the percentages of races are proportionate." (Slip op. at 6).[10]

Unlike these courts, the Second Circuit here interpreted the need to develop findings, and have such findings articulated on the record far more leniently. While admitting that explicit findings of past discrimination do not appear in the committee reports, the Second Circuit found the record "not entirely silent" and held that the lower court's finding of past

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[10] Similarly, in a district court case within the Second Circuit decided previous to the Second Circuit's decision here, the court found that the minority business set-aside amendment had been imposed within its jurisdiction "without the necessary finding that there existed prior discrimination that needed to be remedied." *Wright Farm Construction* v. *Kreps*, *supra*, note 3 at 25.

discrimination properly was established from three other sources: (1) statements by the amendment's sponsor and a supporter to the effect that minority businesses are excluded from contract awards; (2) an unrelated report on minority business opportunities by the Commerce Department concerning the "historical exclusion" of minority entrepreneurs from the mainstream economy; and (3) an unrelated report concerning the preclusion of minority businesses, particularly in the construction industry, prepared by the House Subcommittee on Small Business Administration Oversight and Minority Business Enterprise. (Slip op. at 11-14).

The Second Circuit's opinion, when compared with the other court decisions reviewed above places in stark relief the question of whether Congress validly exercised its "special competence to make findings with respect to the effects of identified past discrimination" and whether the amendment constitutes an appropriate remedial measure within its discretionary authority. *Regents of the University of California* v. *Bakke*, *supra* at 1015 n.41 (Powell, J.). In *Bakke*, Justice Powell specifically sanctioned only legislation, such as Section 5 of the Voting Rights Act of 1965, which gave detailed consideration of past discriminatory acts and charged particular administrative bodies with monitoring similar future violations and formulating appropriate remedies. 98 S. Ct. 2733, 2755, n.41. Justice Brennan, on the other hand, gave specific approval to the minority business set-aside amendment here challenged, finding within it a congressional judgment that the remedial use of race is permissible. "The legislative history of this race conscious legislation", Justice Brennan

stated, "reveals that it represents a deliberate attempt to deal with the excessive rate of unemployment among minority citizens and to encourage the development of viable minority controlled enterprises." *Id.* at 2778-79. That any purported conflict between Title VI of the Civil Rights Act of 1964 and the amendment was not raised during consideration of the new legislation reflects, according to Justice Brennan, a valid congressional judgment that the remedial use of race is permissible under Title VI. *Id.*

Without expressing an opinion on the legality of the amendment, EEAC submits that this issue raises critical questions about the equal protection guarantees inherent in the Due Process Clause of the Fifth Amendment and Congressional enactments which may impact upon it—questions which need to be addressed by this Court. The equal protection issue, which has been raised before in the context of another minority business assistance program,[11] has plagued courts

[11] Equal protection challenges to Section 8(a) of the Small Business Act, 67 Stat. 232, 15 U.S.C. § 631, which empowers the Small Business Administration to award noncompetitive contracts to businesses termed disadvantaged, have brought mixed results. Some courts have held that the Section 8(a) program does not violate the Fifth Amendment because the class of persons eligible is not defined racially but by social and economic disadvantage. See, *e.g.*, *Kleen-Rite Janitorial Services, Inc.* v. *Laird*, —— F. Supp. ——, No. 71-1968 (D. Mass., Sept. 21, 1971). Because an overwhelming percentage of 8(a) contracts have been awarded to members of certain minority groups, however, the racial impact of the program leaves in doubt its constitutionality. *See, e.g., Ray Baillie Trash Hauling, Inc.* v. *Kleppe*, 334 F. Supp. 194 (S.D. Fla. 1971), *rev'd*, 477 F.2d 696, *reh'g denied*, 478 F.2d 1403 (5th

nationwide. If left unresolved, it may well return to plague the federal courts anew, if not under a future public works program,[12] then most likely under recent legislation extending minority business subcontracting programs throughout the multitude of federal procurement programs.[13]

Cir.), *cert. denied*, 415 U.S. 914 (1973) (district court decision that 8(a) subcontracts could not be awarded noncompetitively overturned on appeal, but on the issue of equal protection, not addressed by the appellate court because plaintiffs found to lack standing, district court found program violative of equal protection). *See generally* Knebel, "Legal Basis for SBA's Minority Enterprise Program," 30 Fed. B.J. 271 (1971); Comment, "Minority Construction Contractors," 12 Harv. C.R.-C.L. L. Rev. 693, 701-15 (1977).

[12] On this Court's remand to the district court in *AGC of California* v. *Secretary of Commerce, supra* note 3, to determine whether the case was moot, the court noted that a Round III to the Public Works Act had been proposed in Congress along with a flexible 2-15% minority quota and 10% nationwide "target." Although the Court acknowledged that the proposed legislation was not enacted, it found that such a proposal "demonstrates that Congres will likely allocate and appropriate further funds using a quota" and thus the quota issue was not moot. (Slip op. at 13-18).

[13] See the programs discussed in the Appendix, *infra*. In its emphasis upon statistical data to support preferences for businesses owned and operated predominantly by certain minority group individuals, the new minority business legislation, discussed *supra* at Part I.B., closely parallels the legislation here challenged. Thus, in establishing the need for disadvantaged business subcontracting plan requirements, the House report stated that:

> "Small business, and in particular, small businesses owned by the disadvantaged, have not been considered fairly as subcontractors and suppliers to prime contractors performing work for the Government. For example, military procurements comprise the largest single portion of the Federal purchase budget, yet in fiscal year 1976 (plus the transitional quarter), minority owned firms received only nine-tenths of one percent of military subcontracts. Large businesses, on the other hand, received 62.5 percent of all military subcontracts. The Department of Defense, despite the extreme and continuous urging by this committee, has not undertaken significant action to increase subcontract awards to small and minority owned firms." H.R. Rep. No. 949, 95th Cong., 2d Sess. 5 (1978).

Equally significant is the fact that the Second Circuit here, like other courts which have addressed this issue, has drawn support for its ruling from equal employment court decisions. The invocation of equal employment case law as precedent either for or against the constitutional validity of the minority business set-aside amendment introduces important implications for the legal application of both sets of laws, and thus warrants review by this Court.

II. THE SECOND CIRCUIT'S RELIANCE UPON THE USE OF AFFIRMATIVE ACTION PROGRAMS IN EMPLOYMENT DISCRIMINATION CASES TO JUSTIFY THE MINORITY BUSINESS SET-ASIDE AMENDMENT ESTABLISHES CONCEPTUAL RELATIONSHIPS BETWEEN THESE TWO AREAS WHICH THIS COURT SHOULD REVIEW AND CLARIFY.

In evaluating the validity of affirmative action programs, and the limitations upon their use, the Second Circuit primarily looked to employment discrimination cases. For the proposition that racial preference is an appropriate remedy to overcome the disadvan-

tages resulting from past discrimination, the court endorsed the district court's reliance upon judicial approval of the Labor Department's affirmative action "Home Town" plans. (Slip op. at 14 and n.11, citing *Associated Gen. Contractors* v. *Altshuler*, 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974), and *Contractors Ass'n of Eastern Pennsylvania* v. *Secretary of Labor*, 442 F.2d 159 (3rd Cir.), *cert. denied*, 404 U.S. 954 (1971)). These plans, however, were expressly addressed to remedying proven egregious and long-standing exclusion of minorities by various construction unions. Thus, in his opinion in *Bakke*, *supra*, Justice Powell cited the "Home Town" cases with approval as good examples of an "administrative body charged with the responsibility of mak[ing] determinations of past discrimination by the industries affected, and fashion[ing] remedies deemed appropriate to rectify the discrimination." 98 S. Ct. at 2754. These cases were disapproved by Justice Powell as precedent for the University of California to implement racial and ethnic "set-asides" in its medical school class based only on statistical disparities in minority representation and without a finding of past discrimination. As in *Bakke*, *supra*, the legislative history here lacks specific findings of prior discriminatory acts in the granting and awarding of contracts. The question therefore remains whether the need to establish findings of discrimination "in the record" (*Id.* at 2759) varies either qualitatively or quantitatively depending upon the governmental source of the racial preference program. Of concern, ultimately, is whether legislative findings, however made, of low representation of minority business participation in federally

assisted or contracted programs may be sufficient to render a racial preference program constitutional, whereas similar findings by an administrative body or court would not render preferential treatment permissible absent a showing of specific discriminatory practices.

In evaluating the equitable limitations placed upon fashioning remedies for past discrimination in the employment area, the Second Circuit also has raised disturbing questions about its own decisions. Noting that the effects of "reverse discrimination" as a remedy should not be concentrated upon a small ascertainable group of non-minority persons, the Second Circuit invoked its decision in *Kirkland* v. *New York State Department of Correctional Services*, 520 F.2d 420 (2d Cir. 1975), *reh'g en banc denied*, 531 F.2d 5, *cert. denied*, 429 U.S. 823 (1976). In *Kirkland*, however, the court also made clear that quotas are an extreme remedy which may be imposed only where no adequate relief can be obtained without their use, *Id.* at 427, an issue which was not addressed by the Second Circuit here. Yet, as noted earlier, a finding that alternative means did exist was made explicitly by the district court in *AGC of California* v. *Secretary of Commerce*, *supra*.[14]

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[14] "In this case . . . this Court has previously found, and continues to believe that means of promoting employment of minority group contractors less intrusive than the 10% racial quota enacted by Congress existed. As pointed out in the Court's original decision, the MBE provision does not limit itself to businesses which have previously experienced a prescribed level of income or unemployment. In addition, Congress has never demonstrated that affirmative action plans in this industry are not feasible. Furthermore, the 2-15% MBE

Courts, including the Second Circuit, have exhibited extreme caution in approving, even as remedies, employment schemes that involve preferential treatment of minorities or women who cannot demonstrate that they are the individual victims of discrimination.[15] Thus, the Second Circuit panel's reliance upon employment discrimination cases also needs to be evaluated in terms of *Furnco Construction Corp.* v. *Waters*, —— U.S. ——, 46 U.S.L.W. 4966 (U.S. 1978), where this Court declared that an employer's hiring obligation "is [only] to provide an equal opportunity for *each* applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the workforce."

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provision in the most recent bills introduced in Congress, while still maintaining a quota system, may indeed be less intrusive than the original strict 10% quota system." (*AGC of California*, Slip op. at 28-29).

In recently upholding a city council's affirmative action plan which required a goal of 15 percent minority workers on city jobs, the U.S. District Court for Connecticut invoked both *Bakke, supra* and *Fullilove, supra*, without discussing whether less intrusive means existed to promote minority employment. *IBEW Local 35* v. *City of Hartford, et al.*, —— F. Supp. ——, Civil Action No. H-77-167 (D. Conn., Dec. 11, 1978).

[15] *See e.g., Ostapowicz* v. *Johnson Bronze Co.*, 541 F.2d 394 (3rd Cir. 1976), *cert. denied*, 429 U.S. 1041, *reh'g. denied*, 430 U.S. 911 (1977) ("Quotas are an extreme form of relief and, while this Court has declined to disapprove their use in narrow and carefully limited situations [citations omitted], certainly that remedy has not been greeted with enthusiasm."); *Patterson* v. *American Tobacco Co.*, 535 F.2d 257, 274 (4th Cir. 1976), *cert. denied*, 429 U.S. 920 (1977) ("[T]he necessity for preferential treatment should be carefully scrutinized and . . . such relief should be required only when there is compelling need for it.").

Id. at 4970. The related issues raised, but not addressed by the Second Circuit panel, are (1) whether Congress may rely upon purely statistical evidence of underrepresentation of minorities to mandate the proportionate representation of racial groups in government procurement programs and if so, (2) whether less rigid remedial principles apply to Congress's authority to set aside contracts to minority business than apply to the power of courts to fashion remedies under Title VII and other equal employment laws.

In sum, because the record here appears to lack Congressional findings of specific instances of past discriminatory acts or policies, at least in terms of identified practices or victims, the question of whether discrimination inferred solely from minority underrepresentation may serve as a valid basis for racial preferences in government contracting is presented for review. Serious splits exist among lower federal courts on the issue, and similar subcontracting programs have been enacted by Congress and promulgated by administrative regulation.[16] It is therefore respectfully urged that certiorari be granted, not only because of "an apparent conflict of approach" to an important constitutional question, *cf. Saxbe* v. *Washington Post Co.*, 417 U.S. 843, 846 (1974) but because of the continuing vitality of the issue, regardless of the status of funds appropriated under the Act here challenged. *Cf. The Colony, Inc.* v. *Commissioner*, 357 U.S. 28, 32 (1958).[17]

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[16] See programs discussed in Part I.B., *supra*, and in the attached Appendix, *infra*.

[17] As to any possible question of mootness, see notes 7 and 12, *supra*.

Moreover, although the issues here have strong similarities to those raised in *Regents of the University of California* v. *Bakke*, *supra*, the need to resolve them is more compelling, because the authority from which the racial preference program derives is not an administrative regulation but the statute itself. It thus raises clear questions concerning Congressional authority and actions. Nor do countervailing constitutional interests restrict the Court's evaluation of this amendment. In *Bakke*, this Court addressed the possibility, and then rejected the need of having to substitute its judgment for the judgment of state educational authorities upon difficult and debatable questions of educational policy with potential First Amendment implications. 98 S. Ct. at 2760-64. In contrast, no conflict arises here between First Amendment and equal protection principles. More simply, the Court is called upon to review directly the constitutional validity of a statute and thus exercise unqualifiedly its duty to police constitutional boundaries.

CONCLUSION

For these reasons, we respectfully urge the Court to grant the petition herein and issue a writ of certiorari to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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APPENDIX

SUMMARY OF SIGNIFICANT FEDERAL MINORITY BUSINESS ASSISTANCE AND SUBCONTRACTING PROGRAMS

I. CURRENT PROGRAMS

GOVERNMENTAL SOURCE	PROGRAM	IMPACT
(1) E.O. 11625, the Department of Commerce and other federal agencies.	(a) Office of Minority Business Enterprise (OMBE).	G.S.A. has promulgated regulations requiring that, with certain exceptions, all government contracts in excess of $10,000 include a utilization of Minority Business Enterprise Clause, which obligates the contractor to use its best efforts to maximize MBE subcontracting opportunities consistent with the efficient performance of the contract. 41 C.F.R. Part 1-1.1310-2 (1977).
	(b) Dept. of the Interior MBE subcontracting program.	Temporary rule, promulgated without notice and comment procedures, requiring that federal contractors bidding on nonconstruction contracts exceeding $250,000 set forth detailed plans delineating the amount of contract dollars they will subcontract to minority firms. For construction contracts in excess of $250,000 percentage goals for minority firm subcontracting would have to be set. Agency has set an initial percentage goal of 20%, in most cases. 43 Fed. Reg. 41207 (Sept. 15, 1978).

GOVERNMENTAL SOURCE	PROGRAM	IMPACT
(2) Congress (Railroad Revitalization and Regulatory Reform Act of 1976) and the Department of Transportation. Pub. L. No. 94-210 (90 Stat. 31).	Federal Railroad Administration.	F.R.A. requires contractors under the 1976 Act to establish goals and timetables for minority business and to take affirmative action to increase their utilization.
(3) Congress (Small Business Act of 1953) 67 Stat. 232, 15 U.S.C. §§ 631-647.	Small Business Administration's Section 8(a) program.	S.B.A. enters into procurement contracts with other federal agencies and subcontracts for their performance with small business concerns that are owned by socially and economically disadvantaged persons.
(4) Congress (1961 Amendment to Small Business Act of 1953) 15 U.S.C. § 637(d).	Small Business Administration's Section 8(d) Subcontracting Program.	Program directs the Defense Department, G.S.A., and S.B.A. jointly to develop a subcontracting program for small businesses. Program depends upon voluntary efforts of prime contractors.
(5) Congress (Public Works Employment Act of 1977) 42 U.S.C. § 6705(f)(2).	Minimum 10% MBE provision implemented by Commerce Department's Economic Development Administration (EDA).	Statute [42 U.S.C. § 6705(f)(2)] and regulations required that all grants made under the Act be accompanied by assurances that at least ten percent of grant funds be expended for minority business enterprises.
II. PROPOSED PROGRAM		
Office of Management and Budget.	Office of Federal Procurement Policy proposal concerning subcontracting to minority businesses.	Policy would require that firms bidding on contracts in excess of $500,000 submit detailed plans delineating the amount of contract dollars they will subcontract to minority firms. For construction contracts in excess of $500,000, percentage goals for minority firm subcontracting would have to be set. "Best efforts" clause would be required for contracts under $500,000. 43 Fed. Reg. 14781 (April 7, 1978).
III. NEW PROGRAMS		
P.L. No. 95-507, 92 Stat. 1757, 15 U.S.C. §§ 683 *et seq.* (1978).	Affects both SBA's Section 8(a) and Section 8(d) programs (Part I(3) and (4), above).	(a) Eligibility requirements for both programs would be established. §§ 201 and 211.
		(b) Under 8(d) subcontracting programs, winners of federal contracts exceeding $1 million for construction and $500,000 for other purposes would be required to develop and have approved a minority business enterprise (MBE) subcontracting plan. § 211.
(2) Environmental Protection Agency.	Treatment Works Construction Grants; Policy for Increased Use of Minority Consultants and Construction Contractors.	Policy requires that regional goals be established for minority business participation, and that such goals be implemented by each grantee in cooperation with EPA's Office of Civil Rights and Urban Affairs. 43 Fed. Reg. 60220 (December 26, 1978).